SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 385

FIRST CHROLD CORPORATION, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 28, 1938.

—8641

United States Board of Tax Appeals.

DOCKET NO. 81629.

FIRST CHROLD CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:
For Taxpayer: JOHN E. MCCLURE, ESQ.
For Commissioner: I. M. TULLAR, ESQ.

DOCKET ENTRIES.

Sept. 19, 1935.	Petition received and filed. Taxpayer notified. (Fee paid.)
Sept. 20, 1935.	Copy of petition served on General Counsel.
Nov. 8, 1935.	Answer filed by General Counsel.
Nov. 14, 1935.	Copy of answer served on taxpayer.
Mar. 13, 1936.	Motion for circuit hearing at New York City filed by taxpayer. 3/13/36 Granted.
Aug. 6, 1937.	Hearing set week beginning Oct. 11, 1937, in New York City.
Oct. 15, 1937.	Called on the merits, 10/11/37. Hearing had before Mr. Van Fossan, Div. 9. Submitted. Stipulation of facts and petitioner's brief (served on the respondent) filed at hearing. Respondent's reply brief due 30 days.

Nov. 2, 1937.	Transcript of hearing, Oct. 15, 1937, filed.
Nov. 13, 1937.	Reply brief filed by General Counsel.
Nov. 18, 1937.	Reply brief filed by taxpayer. 11/19/37 copy served on General Counsel.
Nov. 30, 1937.	Memorandum opinion rendered, Mr. Van Fossan, Div. 9. Decision will be entered under Rule 50.
Dec. 11, 1937.	Motion for redetermination filed by General Counsel. Consented to by taxpayer.
Dec. 11, 1937.	Decision entered—Ernest H. Van Fossan, Div. 9.
Jan. 24, 1938.	Petition for review by United States Circuit Court of Appeals, Third Circuit, with assignments of error filed by taxpayer.
Jan. 24, 1938.	Proof of service filed by taxpayer.
Jan. 24, 1938.	Statement of evidence lodged.
Jan. 24, 1938.	Notice of lodgment of statement of evidence and hearing on 2/2/38 filed by taxpayer.
Jan. 24, 1938.	Præcipe for record filed by taxpayer —with proof of service thereon.
Feb. 2, 1938.	Hearing had before Mr. Van Fossan on settlement of statement of evidence. Respondent has no objections.
Feb. 4, 1938.	Statement of evidence approved and ordered filed.

PETITION.

(Filed September 19, 1935.)

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 81629.

FIRST CHROLD CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:A-4 GCH-90D), dated July 12, 1935, and as a basis of its proceedings alleges as follows:

I. The petitioner is a corporation with its principal office at 19 Dover Green, Dover, Delaware.

II. The notice of deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on July 12, 1935.

III. The taxes in controversy are income and excess profits taxes for the year 1933 in the amounts of $4794.05 and $1743.29, respectively.

IV. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The Commissioner erred in transferring the syndicate profit of $6435.17 from the year 1932 to the year 1933.

(2) The Commissioner erred in adding to income the sum of $27,944.65, representing an al-

leged profit from the sale by the petitioner of its own capital stock.

V. The facts upon which the petitioner relies in support of its appeal are as follows:

Issue No. 1, Syndicate Profit:

(a) During 1932, the petitioner participated in certain syndicates, and reported as income for that year its share of the income of such syndicates, although the income was not in fact distributed until 1933.

(b) The amount of such income earned in 1932 and distributed to your petitioner amounted to $6435.17.

(c) The respondent, in determining the deficiency herein, added the said $6435.17 to the petitioner's 1933 income, on the theory that the said syndicates were associations taxable as corporations.

(d) The said $6435.17 was available to your petitioner in 1932 and constituted income to your petitioner for the year 1932.

Issue No. 2, Profit on Own Stock:

(a) The petitioner was formed on April 8, 1930, under the laws of Delaware, with an authorized capital stock of 100,000 shares without par value, for the primary purpose of buying and selling stock listed on the New York Stock Exchange.

(b) On August 4, 1932, the stockholders approved a reduction in the authorized capital stock of 100,000 shares of no par value to 10,000 shares of no par value, and the articles of incorporation were accordingly amended.

(c) While the petitioner was authorized to issue 10,000 shares of no par value, it never at any time had issued that number of shares. The maximum number issued at any one time was 5748 shares.

(d) Practically all the stockholders of petitioner were customers of E. F. Hutton & Company; one Gerald M. Loeb, manager of petitioner was a partner of E. F. Hutton & Company during the year in question.

(e) From time to time a few of the stockholders, who were also customers of E. F. Hutton & Company, wanted to retire from the company, for some reason or other. The petitioner was a small corporation and the stock was not listed on any exchange, and there were no outside funds available. Petitioner purchased said stock, such purchase being made usually at one point below the liquidated value of the assets of the petitioner.

(f) From time to time other customers of E. F. Hutton & Company desired to acquire stock of the petitioner, and sales were made to such persons usually at one point above the liquidated value of the assets of petitioner. There is attached hereto, marked Exhibit B, a statement showing the number of shares retired through purchase, the price paid therefor, and the number of shares issued and sold, and the price at which sold, during the years 1931 to 1934, inclusive. During 1933, the petitioner sold to such persons 662 shares at a total selling price of $92,593.05, new certificates being issued at the time to such new shareholders.

(g) The respondent, in determining the deficiency herein, assumed and determined that the shares of stock sold by the petitioner during 1933 for $92,593.05 were acquired by the petitioner during 1931 at a cost of $64,648.40, and added to income the difference of $27,944.65.

(h) Petitioner admits that it did purchase 662 shares in 1931, at a cost of $64,648.40, and further admits that it sold 662 shares during 1933 for the sum

of $92,593.05. Petitioner alleges, however, that the shares of stock sold in 1933 were not purchased by it in 1931; that the shares purchased in 1931 were retired; and that the sales of shares made in 1933 were from unissued stock and were represented by the issuance of new certificates.

(i) Petitioner further alleges that it never dealt in its own stock and that it realized no gain or loss from such transactions, as stated above.

(j) Petitioner further says that if it is the law that the petitioner realized gain or loss in the sale and purchase of its own stock, then such gain or loss occurred during previous years, when the outstanding shares of stock were purchased, in that under the following statement by the Supreme Court in *United States v. Kirby Lumber Company*, 284 U. S. 1:

> "... As a result of its dealings it made available $137,521.30 assets previously offset by the obligation of bonds now extinct. We see nothing to be gained by the discussion of judicial definitions. The defendant in error has realized within the year an accession to income, if we take words in their plain popular meaning, as they should be taken here ...."

gain or loss occurred when petitioner repurchased the certificates of stock below or above the issuing price, and petitioner did not realize any such profit or sustain any such loss during 1933, in that it did not repurchase any of its stock during said year.

WHEREFORE, petitioner prays that this Board may hear the proceeding and determine that the Commissioner erred as alleged above.

(Sgd.) JOHN E. MCCLURE,
920 Southern Building,
Washington, D. C.,
Attorney for Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

WALTER D. EBBITT, being duly sworn, says that he is president of the First Chrold Corporation, and as such is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be on information and belief, and those facts he believes to be true.

(Sgd.) WALTER D. EBBITT.

Subscribed and sworn to before me this seventeenth day of September, 1935.

(Sgd.) ALBERT T. DICKERSON,
(Seal) *Notary Public.*
My commission expires March, 1937.

EXHIBIT A.

IT:AR:A-4
GCH-90D

JUL 12 1935

First Chrold Corporation,
61 Broadway,
New York, New York.

Sirs:

You are advised that the determination of your tax liability for the year 1933, discloses a deficiency in income tax of $4,794.05 and excess profits tax of $1,743.29, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not count-

ing Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By (Signed) CHAS. T. RUSSELL
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT.

IT:AR:A-4
GCH-90D

In re: First Chrold Corporation,
61 Broadway,
New York, New York.

Tax Liability for Taxable Year 1933

	Liability	Assessed	Deficiency
Income Tax	$24,562.60	$19,768.55	$4,794.05
Excess profits tax	2,056.85	313.56	1,743.29

The deficiency shown herein is based upon the report dated September 22, 1934 prepared by Revenue Agent Henry Bender, a copy of which was transmitted to you.

Careful consideration has been accorded your protest dated February 25, 1935, in connection with findings of the examining officer and the information submitted at a conference held in this office on July 9, 1935.

The overassessment of $452.80 for the year 1932 recommended in the above-mentioned report cannot be allowed due to the fact that in accordance with the provisions of section 322 of the Revenue Act of 1932 "no such credit or refund shall be allowed or made after two years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer." The records of this office indicate that the total tax liability for the year 1932 was paid on March 16, 1933 and that no claim for refund was filed by you prior to March 15, 1935.

1933

Net income shown on return		$143,771.25
Add:		
(1) Insurance premiums	$486.00	
(2) Profit from sale of corporation's own stock	27,944.65	
(3) Syndicate profit	6,435.17	
		34,865.82
Adjusted net income		$178,637.07

Explanation of Changes.

(1) Insurance premiums paid on lives of officers where corporation is the beneficiary is not an allowable deduction.

(2) Profit realized on sale of own stock is as follows:

Received from sale of 662 shares	$92,593.05
Adjusted cost	64,648.40
Taxable net profit realized	$27,944.65

(3) Net profits from syndicates in 1933 have been adjusted as follow:

Joint accounts		$84,424.80
Received from Novadel Trading Account	$13,850.56	
Reported	8,390.77	
		5,459.79
Received from General American Tank Car Trading Account	$ 254.29	
Reported	24.38	
		229.91
Received from American Com'l. Alcohol Trading Account	$ 834.55	
Reported	89.08	
		745.47
Total amount received		$ 90,859.97
Amount reported on return		84,424.80
Additional income		$ 6,435.17

Computation of Tax.

Net income, taxable at 13¾%	$178,637.07
Tax at 13¾%	24,562.60
Tax previously assessed	19,768.55
Deficiency	$ 4,794.05

Excess Profits Tax.

Net income	$178,637.07
Less:	
12½% of $1,100,000.00 value of capital stock as declared in capital stock tax return ended June 30, 1933	137,500.00
Balance subject to excess profits tax at 5%	$ 41,137.07
Excess profits tax at 5%	2,056.85
Tax previously assessed	313.56
Deficiency	$ 1,743.29

Your return for the taxable year 1934, disclosing no tax liability has been accepted as filed.

A copy of this letter together with a copy of the statement and schedules has been mailed to your representative Miller and Chevalier, Southern Building, Washington, D. C., in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

EXHIBIT B.

PURCHASES AND SALES BY THE CORPORATION OF ITS OWN STOCK.

1931	Purchases			1931	Sales		
Date	Shs.	Price	Cost	Date	Shs.	Price	Proceeds
Feb. 16	60	114	$ 6,855.00	Feb. 20	25	114⅝	$ 2,858.38
Mar. 30	100	111	11,125.00	Feb. 24	35	116	4,049.85
Apr. 14	50	111½	5,562.50	Mar. 31	50	113	5,635.00
Apr. 20	100 Cash	110	11,025.00	Apr. 2	10	113	1,126.60
May 6	50	108	5,412.50	Apr. 16	90	111¼	10,031.40
Aug. 4	100	100¾	10,100.00		210 shs.		
Aug. 26	50	96	4,810.00				
Aug. 27	50	96	4,810.00				
Sept. 21	136	96	13,083.20				
Sept. 30	50	98	4,910.00				
Oct. 6	250 Cash	98	24,550.00				
Oct. 6	150 Cash	98	14,730.00				
Oct. 8	150 Cash	98	14,730.00				
Oct. 21	50	98	4,910.00				
Oct. 26	10	98	983.00				
Nov. 10	250 Cash	100	25,062.50				
Nov. 13	50	100	5,012.50				
Dec. 10	25 Cash	103¾	2,600.00				
Dec. 11	5	102	513.00				
	1,686 shs.						

Total Purchases	1,686 shares
Less Total Sales	210 "
Shs. held at end of 1931	1,476 "

1932				1932			
Feb. 29	146	105½	$15,439.00	Jan. 12	10	106¾	$ 1,064.10
May 11	24	105¼	2,532.00	Dec. 7	200	118.98	23,728.00
May 19	450	102	46,012.50				
June 21	10	108	1,083.00				
July 5	10	108	1,083.00				
	640 shs.						

Total Purchases	640 shares
Less Total Sales	210 "
	430 "

Balance at end of 1931	1,476 shares
Plus purchases in 1932	640 "
	2,116 "
Less sales in 1932	210 "
Balance at end of 1932	1,906 "

1933

Purchases			
Date	Shs.	Price	Cost

1933

Sales			
Date	Shs.	Price	Proceeds
Feb. 23	20	117	$ 2,333.20
May 3	5	132	656.55
May 5	25	133½	3,329.00
May 8	50	133½	6,658.00
May 9	40	134	5,346.00
May 11	25	131⅜	3,288.38
May 15	25	131	3,266.50
May 22	40	129	5,146.40
June 9	10	142	1,416.10
June 9	50	142	7,083.00
June 9	25	144	3,591.50
July 12	50	146	7,283.00
Aug. 31	65	146	9,467.90
Sept. 1	3	146¾	436.98
Sept. 6	2	145½	287.82
Sept. 18	10	150¼	1,498.60
Sept. 26	100	145	14,466.00
Oct. 25	4	147	584.64
Nov. 21	86	146	12,526.76
Dec. 4	17	143	2,425.22
Dec. 19	10	150½	1,501.10
Total	662 Shs. Sold		

Balance at end of 1932	1,906 shares
Less Sales in 1933	662 "
Balance at end of 1933	1,244 "

1934

1934

Jan. 16	50	148⅝	$ 7,414.25
Feb. 15	100	139¾	13,941.00
Feb. 21	100	142	14,166.00
Total	250 Shs. Sold		

Balance at end of 1933	1,244 shares
Less Sales in 1934	250 "
Balance, 1934	994 "

ANSWER.

(Filed November 8, 1935.)

COMES now the Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, assistant general counsel for the Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

I-II-III. Admits the allegations in paragraphs I, II and II of the petition.

IV. Denies the allegations of error in paragraph IV of the petition.

V. *Issue No. 1, Syndicate Profit.*

(a) Admits that petitioner participated in certain syndicates during 1932; that it reported profits from syndicates for 1932; and that part of said income was not distributed until 1933; but denies the remaining allegations in subparagraph (a), Issue No. 1, paragraph V of the petition.

(b) Admits that the amount of such income distributed to petitioner during 1933 was $6435.17, but denies the remaining allegations in subparagraph (b), Issue No. 1, paragraph V of the petition.

(c) Admits the allegations in subparagraph (c), Issue No. 1, paragraph V of the petition.

(d) Denies the allegations in subparagraph (d), Issue No. 1, paragraph V of the petition.

V. *Issue No. 2. Profit on Own Stock.*

(a)-(b)-(c)-(d). For lack of full and complete information, denies the allegations in subparagraphs (a), (b), (c), and (d), Issue No. 2, paragraph V of the petition.

(e) Admits that petitioner purchased from time to time, the stock of its stockholders, but denies the remaining allegations in subparagraph (e), Issue No. 2, paragraph V of the petition.

(f) Admits that petitioner sold 662 shares of its capital stock during 1933 for a total of $92,593.05, but denies the remaining allegations in subparagraph (f), Issue No. 2, paragraph V of the petition.

(g) Admits the allegations in subparagraph (g), Issue No. 2, paragraph V of the petition.

(h) Admits that petitioner purchased 662 shares of its stock during 1931 for $64,648.40, and that it sold 662 shares during 1933 for the sum of $92,593.05; but denies the remaining allegations in subparagraph (h), Issue No. 2, paragraph V of the petition.

(i)-(j). Denies the allegations in subparagraphs (i) and (j), Issue No. 2, paragraph V of the petition.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that petitioner's appeal be denied.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
HUGH BREWSTER,
Special Attorney,
Bureau of Internal Revenue.

HB/vn 11-7-35

MEMORANDUM OPIONION.

(Rendered November 30, 1937.)

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 81629.

First Chrold Corporation,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

John E. McClure, Esq., for the petitioner.
I. M. Tullar, Esq., for the respondent.

VAN FOSSAN: These proceedings were brought to redetermine deficiencies in income and excess profits taxes of the petitioner for the year 1933 in the sums of $4,794.05 and $1,743.29, respectively.

The sole issue in the case is whether the petitioner dealt in its own shares of stock as it might in the shares of another corporation or, in other words, whether the petitioner, by purchasing shares of its own stock and later selling them, realized a taxable gain.

The pleadings established a second issue relating to the proper year for correctly reporting syndicate profit. The parties agree by stipulation that this syndicate profit was correctly reported as income in 1932 and that the respondent was in error in including the profit therefrom as income in 1933.

The facts, which, for the most part, were stipulated, are as follows:

The petitioner is a Delaware corporation organized April 8, 1930, for the purpose of speculating in listed

stocks. In the course of its business the petitioner never owned stocks that were not listed on the Exchange. During the taxable year the petitioner had authorized capital stock of 10,000 shares of which 5,749 were issued at approximately $100 per share.

Mr. Gerald M. Loeb, a partner of E. F. Hutton & Co. of New York City, managed the petitioner from the time of its organization through the taxable year. The original subscribers for the petitioner's stock were some 60 or 70 friends of Mr. Loeb, who were promised at the time the stock was issued that the corporation would repurchase the stock if they wished to sell it, and if financial conditions permitted. The stock of the petitioner was not listed on any stock exchange.

The petitioner made the following purchases and sales of its own stock during the period from 1931 to 1933, inclusive:

1931	PURCHASES			1931	SALES		
Date	Shs.	Price	Cost	Date	Shs.	Price	Proceeds
Feb. 16	60	114	$ 6,855.00	Feb. 20	25	114⅝	$ 2,858.38
Mar. 30	100	111¼	11,125.00	Feb. 24	35	116	4,049.85
Apr. 14	50	111¼	5,562.50	Mar. 31	50	113	5,635.00
Apr. 20	100 Cash	110	11,025.00	Apr. 2	10	113	1,126.60
May 6	50	108	5,412.50	Apr. 16	90	111¼	10,031.40
Aug. 4	100	100¾	10,100.00		210 shs.		
Aug. 26	50	96	4,810.00				
Aug. 27	50	96	4,810.00				
Sept. 21	136	96	13,083.20				
Sept. 30	50	98	4,910.00				
Oct. 6	250 Cash	98	24,550.00				
Oct. 6	150 Cash	98	14,730.00				
Oct. 8	150 Cash	98	14,730.00				
Oct. 21	50	98	4,910.00				
Oct. 26	10	98	983.00				
Nov. 10	250 Cash	100	25,062.50				
Nov. 13	50	100	5,012.50				
Dec. 10	25 Cash	103¾	2,600.00				
Dec. 11	5	102	513.00				
	1,686 shs.						

Total Purchases	1,686 shares
Less Total Sales	210 "
Shs. held at end of 1931	1,476 "

1932				1932			
Feb. 29	146	105½	$15,439.00	Jan. 12	10	106¼	$ 1,064.10
May 11	24	105¼	2,532.00	Dec. 7	200	118.98	23,728.00
May 19	450	102	46,012.50				
June 21	10	108	1,083.00				
July 5	10	108	1,083.00				
	640 shs.						

Total Purchases	640 shares
Less Total Sales	210 "
	430 "

Balance at end of 1931	1,476 shares
Plus purchases in 1932	640 "
	2,116 "
Less sales in 1932	210 "
Balance at end of 1932	1,906 "

1933

Purchases			
Date	Shs.	Price	Cost

1933

Sales			
Date	Shs.	Price	Proceeds
Feb. 23	20	117	$ 2,333.20
May 3	5	132	656.55
May 5	25	133½	3,329.00
May 8	50	133½	6,658.00
May 9	40	134	5,346.00
May 11	25	131⅜	3,288.38
May 15	25	131	3,266.50
May 22	40	129	5,146.40
June 9	10	142	1,416.10
June 9	50	142	7,083.00
June 9	25	144	3,591.50
July 12	50	146	7,283.00
Aug. 31	65	146	9,467.90
Sept. 1	3	146¾	436.98
Sept. 6	2	145½	287.82
Sept. 18	10	150¼	1,498.60
Sept. 26	100	145	14,466.00
Oct. 25	4	147	584.64
Nov. 21	86	146	12,526.76
Dec. 4	17	143	2,425.22
Dec. 19	10	150½	1,501.10
Total	662 Shs. Sold		

Balance at end of 1932	1,906 shares
Less Sales in 1933	662 "
Balance at end of 1933	1,244 "

It will be noted that the petitioner, during 1933, sold 662 shares of its own capital stock at a total selling price of $92,593.05. The respondent, in determining the deficiencies asserted determined that these 662 shares of stock sold by the petitioner during 1933 for $92,593.05 were acquired by the petitioner during 1931 at a cost of $64,648.40 and accordingly added to income the difference of $27,944.65. The petitioner admits that it did purchase 662 shares of its own capital stock in 1931 and sold the same number of shares in 1933, for the sums above mentioned. The purchases and sales of the stock were made on the basis of liquidating value, plus or minus a marginal difference to take care of inaccuracies.

When the petitioner purchased the shares of its own stock they were charged to an account designated "Treasury Stock" in the amounts paid therefor, and they were carried as such on the liability side as a deduction from issued capital. Upon subsequent sales of shares of the stock this account was credited with the cost of the respective shares sold, and the excess of the amount received upon the sale of shares over the price at which an equal number of shares were purchased was credited to an account designated "Surplus From Sale of Treasury Stock". No adjustment was made in the outstanding capital stock by reason of such purchases and sales, the matter being handled entirely by an increase or decrease in the treasury stock. Purchases of stock or securities other than shares of its own capital stock were carried in separate accounts designated "Speculative Long Position in Market" and "Investment Long Position in Market".

The question presented under the applicable statute [1] and regulations [2] is whether the petitioner was dealing in its own shares as it might in the shares of another corporation.

The petitioner denies that it was dealing in its own shares as it might in the shares of another corporation and argues in the alternative that if it did realize any profit from buying and selling its own stock the profit arose, not when the petitioner sold the treasury stock in 1933 but in 1931 when it bought the stock. *Commissioner v. Woods Machine Co.*, 57 Fed. (2d) 635 (1st C. C. A.) to the effect that the real nature of the transaction controls, and *United States v. Kirby Lumber Co.*, 284 U. S. 1, are relied upon to support this latter contention.

We are of the opinion, however, that neither of the positions taken by the petitioner is tenable.

The decision of the Board in *R. J. Reynolds Tobacco Co.*, 35 B. T. A. 494, governs the present case.

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[1] Section 22 of the Revenue Act of 1932.

GROSS INCOME.

(a) *General Definition*—"Gross income" includes gains, profits and income derived from . . . sales, or dealings in property, . . . the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

[2] Regulations 77, Article 66, as amended by T. D. 4430.

Acquisition or disposition by a corporation of its own capital stock.—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

But where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of applicable statutes.

The Board there held the Regulations to be reasonable and consistent with the statute, and further held that notwithstanding the fact that the purchases and sales of its own stock by the Reynolds Company were grounded on business policy, such transactions were taxable ones from which gain or loss might result. The criterion established is whether the transaction is a capital one. See *Commissioner v. Woods Machine Co., supra.*

It is urged by petitioner that the separation of its treasury stock from its regular investment stocks on its books proves that it did not treat its own stock as an investment. Denominate it or treat it as you will, the fact remains that the corporation realized income from the purchase and resale of its stock. (*R. J. Reynolds Tobacco Co., supra.*) No adjustment was made in the outstanding capital stock of the corporation by reason of the transactions.

An attempt is made to distinguish the *R. J. Reynolds Tobacco Co.* case from the present one on the basis that there the magnitude of the transactions clearly indicated their nature. We do not believe this to be significant.

The alternative position taken by the petitioner falls with the assumption that there is no difference so far as gain or loss is concerned between the case where a corporation issues its own bonds and buys them back as in *United States v. Kirby Lumber Co., supra,* and the case where it issues its own stock and then buys it back. Concededly, the original issue of the petitioner's stock was a capital transaction but once stock was sold there was no obligation on the part of the corporation to pay the holder thereof a specific sum as there would be in the case of a bond. The value of a corporation's stock may fluctuate. When a corporation purchases its own bonds at less than the price

at which they were issued it decreases its outstanding fixed obligations. The same result does not obtain when a corporation buys its own stock at a price less than that at which it was issued.

The petitioner's argument that it is not within the pertinent statute and regulations because it did not want to buy its own stock but was motivated by a prior promise to repurchase it, has heretofore been rejected by the Board. *E. R. Squibb & Sons,* 36 B. T. A. 260.

Decision will be entered under Rule 50.

DECISION.

(Entered December 11, 1937.)

On November 30, 1937, the Board entered its memorandum opinion in the above-entitled proceeding and on December 11, 1937, respondent filed a proposed recomputation of tax, in which petitioner acquiesced. Wherefore, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the year 1933 in the amount of $3909.21; and there is a deficiency in excess profits tax for the year 1933 in the amount of $1421.54.

(Sgd.) ERNEST H. VAN FOSSAN,
Member.

PETITION FOR REVIEW.

(Filed January 24, 1938.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

B. T. A. Docket No. 81629.

First Chrold Corporation,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes First Chrold Corporation, by its attorney, John E. McClure, and petitions this Honorable Court for a review of the decision of the United States Board of Tax Appeals entered on December 11, 1937, redetermining a deficiency in the petitioner's federal income and excess profits taxes for the year 1933 in the amounts of $3909.21 and $1421.54, respectively, and respectfully shows:

I.

First Chrold Corporation is a Delaware Corporation with its principal office at 19 Dover Green, Dover, Delaware. Its returns were filed with the Collector of Internal Revenue for the District of Delaware. This review is sought in the United States Circuit Court of Appeals for the Third Circuit, and Guy T. Helvering, the duly appointed Commissioner of Internal Revenue, is made respondent hereto.

II.

NATURE OF CONTROVERSY.

The controversy involves the amount of deficiency, if any, in federal income and excess profits taxes due from the petitioner for the year 1933. This involves a determination (a) whether petitioner realized gain in buying and selling its own capital stock, and if so, then (b) whether the gain arose in 1931 when the petitioner bought its outstanding capital stock or in 1933 when the stock was resold.

The petitioner was organized on April 8, 1930, for the purpose of dealing in stocks listed on the New York Stock Exchange.

At the time the corporation was formed it promised its stockholders that if they wanted to withdraw from the company for any reason, the corporation would take their stock off their hands at one point below the liquidating value of the stock.

During the break in the market in 1931 and 1932 the petitioner, pursuant to its promise to its stockholders, purchased from them 2326 shares of its own stock as against 420 sold. During 1933, when market conditions were somewhat better, it sold 662 shares as against none repurchased. The petitioner, in filing its return, reported no gain or loss from buying and selling its own stock and the regulations of the Commissioner of Internal Revenue at that time were to the effect that a corporation realized no gain nor sustained any loss from dealing in its own stock. Thereafter the respondent issued a formal notice of deficiency and determined that the petitioner had realized a profit of $27,944.65 on the basis that during 1931 the petitioner had acquired 662 shares of common for $64,648.40 and had sold those shares in 1933 for $92,593.05. The taxpayer appealed to the Board of Tax Appeals, claiming that it realized no gain in buying and selling its own

stock, but even if it had realized a gain the same was realized in 1931 when it repurchased the stock and not in 1933. The Board affirmed the Commissioner's determination.

III.

The petitioner believes, and so believing, avers that errors were committed by the Board to the petitioner's damage and prejudice as shown by the following:

(1) There is no evidence to support the holding that the petitioner was dealing in its own shares of stock.

(2) The Board erred in holding that the petitioner realized a taxable profit in 1933 in buying and selling its own stock.

(3) If, as a matter of law, the petitioner was dealing in its own stock, then the Board erred in not holding that the profit, if any, was realized in 1931 when petitioner repurchased its stock and not in 1933 when the stock was resold.

WHEREFORE, your petitioner prays that the decision of the Board of Tax Appeals entered against it be reviewed and reversed by this Court and for such further relief as the Court may deem proper in the premises.

(Sgd.) JOHN E. MCCLURE,
920 Southern Building,
Washington, D. C.,
Attorney for Petitioner.

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, } *ss.:*

JOHN E. MCCLURE, being duly sworn, deposes and says that he is the attorney for the petitioner; that he knows the contents of the foregoing petition; that to the best of his knowledge and belief the statements therein are true; and that the assignments of error are well taken and will be argued.

(Sgd.) JOHN E. MCCLURE.

Subscribed and sworn to before me this twenty-fourth day of January, 1938.

(Sgd.) BELLE FOUCAULT,
Notary Public, D. C.
My commission expires October 1, 1939.

NOTICE OF FILING PETITION FOR REVIEW.

(Filed January 24, 1938.)

To Honorable J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, Washington, D. C.

Sir:

You are hereby notified that First Chrold Corporation did on the twenty-fourth day of January, 1938, file with the Clerk of the United States Board of Tax Appeals, Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this twenty-fourth day of January, 1938.

(Sgd.) JOHN E. MCCLURE,
920 Southern Building,
Washington, D. C.,
Counsel for Petitioner.

Personal service of the above and foregoing notice together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this twenty-fourth day of January, 1938.

J. P. WENCHEL,
Attorney for Respondent.

STATEMENT OF EVIDENCE.

(Filed February 4, 1938.)

The statements contained in the memorandum opinion entered on November 30, 1937, in the above-entitled proceeding contain all the evidence adduced at the hearing before the Board of Tax Appeals material to the issues raised in the petition for review; and the same are adopted by reference as a statement of evidence.

(Sgd.) JOHN E. MCCLURE,
Counsel for Petitioner on Review.

I HEREBY CERTIFY that the memorandum opinion entered November 30, 1937, contains all the evidence material to the issues raised in the petition for review, and the same is approved this fourth day of February, 1938.

(Sgd.) ERNEST H. VAN FOSSAN,
Member, United States Board of Tax Appeals.

PRÆCIPE FOR RECORD.

(Filed January 24, 1938.)

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, copies duly certified as correct of the following:

(1) Docket entries of the proceedings before the Board.

(2) Pleadings before the Board.

(3) Opinion and decision of the Board.

(4) Petition for review, together with proof of service of notice of filing petition for review and proof of service of copy of petition for review.

(5) Statement of evidence as settled and allowed.

(6) This præcipe.

(Sgd.) JOHN E. MCCLURE,
920 Southern Building,
Washington, D. C.,
Counsel for Petitioner.

Service of a copy of the within præcipe is hereby acknowledged this twenty-fourth day of January, 1938.

J. P. WENCHEL,
Counsel for Respondent.

CLERK'S CERTIFICATE.

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 81629.

First Chrold Corporation,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

I, B. D. GAMBLE, Clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 34, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this eighth day of February, 1938.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

(Seal)

[fol. 32] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1938

No. 6696

FIRST CHBOLD CORPORATION, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

And now, to-wit: this 7th day of April A. D. 1938, it is ordered that Hon. Oliver B. Dickinson, District Judge for the Eastern District of Pennsylvania, and Hon. —— ——, District Judge for the — District of —, be and he is hereby assigned to sit in above case in order to make a full court.

Joseph Buffington, Circuit Judge.

Endorsements: Order Assigning Judge Dickinson for Argument. Received & Filed Apr. 7, 1938. Wm. P. Rowland, Clerk.

[fol. 33] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1938

No. 6696

FIRST CHBOLD CORP., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

And afterwards, to wit, the 7th day of April, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington and Honorable John Biggs, Jr., Circuit Judges, and Honorable Oliver B. Dickinson, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 26th day of May, 1938, come the parties aforesaid by their counsel aforesaid, and

the Court, now being fully advised in the premises, renders the following decision:

[fol. 34] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1938

No. 6696

FIRST CHEROLD CORPORATION, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition for Review from the United States Board of Tax Appeals

OPINION—Filed May 26, 1938

Before Buffington and Biggs, Circuit Judges, and Dickinson, District Judge

DICKINSON, District Judge:

This is an income and excess profits tax case. The taxpayer corporation bought of some of its stockholders shares of stock paying therefor less than its par value. It later sold the stock at a higher price. Was the difference between the selling and purchase price taxable income? The taxpayer thought not and excluded this sum from its taxable income return. The Commissioner thought otherwise, and served the taxpayer with a deficiency notice. The taxpayer appealed to the Board of Tax Appeals, which upheld the Com-[fol. 35] missioner. The taxpayer has asked for this review of the ruling of the Board.

We treat the case as presenting but one question. A corporation which purchases shares of its own stock for less than the sum for which it was issued and then retires the stock may have been advantaged by the transaction in a sense but the real gain is by its remaining stockholders and not by the corporation as such. The change affected is merely a change in the capital structure. The Treasury Regulations so stated and the Courts have so ruled.

Eisner v. Macomber, 252 U. S., 189.

A corporation, however, if so authorized by law, may make the stock of other corporations the subject of purchase and sale precisely as in the case of any other form of property. Any gain from such a transaction is clearly taxable income. A corporation may in fact thus buy and sell its own stock. The gain, if any, is as much a gain as if the transaction was in property other than its own stock. The corporation receives this profit. Its capital structure is not affected. Whether transactions by a corporation in its own stock is a capital or income transaction thus depends upon what the transaction was. The amended Regulations recognize this distinction.

The answer of which we are in search to the question presented, may be made to turn on the nature of shares in the capital stock of a corporation. They are what the word "shares" implies. The relation of corporation and shareholder is not the relation of debtor and creditor otherwise perhaps than in a secondary and remote sense. It is not easy to get in theory the concept of a corporation owning a share of itself and is perhaps not possible. Corporate shares are however easily thought of as property which may be [fol. 36] bought and sold as are other kinds of property. A corporation may in a practical sense so deal in its own stock. When it does, the fact that it is its own stock, is ignored. We know this because corporations do so deal in their own stocks by buying and selling as they buy and sell other property, and this corporation did that very thing here. We are unable to accept the proposition that what it did in fact may be by the use of mental gymnastics turned into the theory that it was not buying and selling its stock as property but when it purchased was reducing the total sum of its capital stock and when it sold expanding its capital. A fairly good test of whether a gain is an income gain or a capital gain is whether it is distributable in dividends payable out of profits. This corporation bought shares of its stock at a price and sold it at a higher price. It in fact had taken in more than it had paid out and had the gain in hand. This was, considered of itself properly distributable in dividends payable out of profits.

The answer to the question presented depends upon whether it is made to turn upon a theory or a fact. In theory a corporation cannot own a share in itself. When it purchases shares in itself, it thereby reduces its capital. When it re-

issues the stock it increases its capital. The transaction is a capital transaction. In fact corporations do buy and sell their own corporate shares, as they buy and sell other forms of property, ignoring, as we have said, the fact that the shares are their own. These are "as if" transactions. The shares are bought and sold as if they were not the corporation's own shares. The capital of the corporation is not affected and the transactions are not capital transactions. If the subjects of purchase and sale were, as is assumed, not the corporation's own shares, the gain, if any, would be an income gain.

[fol. 37] The real question thus becomes one of what the transaction in truth was? Here it was one of the purchase and sale of property. It must of course be admitted that when a corporation has a debt obligation which it acquires by purchase from the holder, its gain, if any, is in its relief from a part of its debt. Here there was an understanding, which may be characterized as a gentleman's agreement, that the corporation would take off the hands of dissatisfied subscribers to its stock, their holdings. The corporation lived up to the spirit of this understanding. It was however not an agreement enforceable by law. The shares purchased by the corporation were bought in fulfilment of this understanding. The promise to purchase merely supplied the motive for the purchase. There was no debt obligation in the sense of a legal obligation.

The petition for a review of the decision of the Board of Tax Appeals is denied, and the ruling of the Board affirmed, with costs to the respondent.

A true Copy. Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 38] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1938

No. 6696

FIRST CHEROLD CORP., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, May 26, 1938.

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Affirming Decree. Received & Filed May 26, 1938. Wm. P. Rowland, Clerk.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

MARCH TERM, 1938.

No. 6696.

FIRST CHROLD CORPORATION, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for Review From the United States Board of Tax Appeals.

PETITION FOR REHEARING.

Comes now the above-named petitioner, by counsel, and petitions the Court for a rehearing, and as a basis for rehearing sets forth the following:

Point I:

The decision of this Court in the instant case, filed May 26, 1938, is at variance with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the case of *R. J. Reynolds Tobacco Company* v. *Commissioner of Internal Revenue,* decided June 6, 1938 and reported at

paragraph 5.489, 1938 Prentice-Hall Federal Tax Service, and at paragraph 9373, 1938 C.C.H. Federal Tax Service.

Point II:

This Court erred in holding that the transactions here in question constituted income transactions as distinguished from capital transactions, in view of a long line of administrative and judicial precedent holding such transactions to be capital transactions.

Point III:

This Court erred in deciding the case on the theory that the agreement among the original subscribers was not an agreement enforceable by law and that therefore no contract in fact existed in view of the fact that the agreement was wholly executed.

ARGUMENT.

Point I. Decision in Conflict With That in Reynolds Case, Circuit Court of Appeals for the Fourth Circuit:

The question involved in this case (whether the petitioner realized taxable gain in buying and selling its own capital stock) is the same as that involved in *R. J. Reynolds Tobacco Company* v. *Commissioner of Internal Revenue*, decided on June 6, 1938 by the United States Circuit Court of Appeals for the Fourth Circuit.

In the *Reynolds* case, the facts were substantially the same as those in the instant case except that (a) petitioner in the *Reynolds* case engaged in a greater number of transactions involving its own stock than did the petitioner in this case; and (b) petitioner in that case had not at the time of issuance agreed to repurchase the stock from its shareholders as had the

petitioner here. The Circuit Court of Appeals for the Fourth Circuit in the *Reynolds* case held that petitioner realized no taxable gain from the sale of its own stock which it had previously purchased for cash. The opinion of Judge Soper in the *Reynolds* case is reported at paragraph 5.489 Prentice-Hall Federal Tax Service for 1938 and at paragraph 9373 C.C.H. Federal Tax Service for 1938.

Point II. Court's Refusal to Pass Upon Validity of Long Continued Administrative Practice and Regulations: In its opinion in the instant case, this Court, speaking through Judge Dickinson, said: "Whether transactions by a corporation in its own stock is a capital or income transaction thus depends upon what the transaction was. The amended Regulations recognize this distinction." It is respectfully submitted that the decision of this Court thus overlooks the fact that at the time the transactions in question took place there was in effect a Treasury regulation, based upon administrative practice over a long period, to the effect that such a transaction was a capital transaction and not an income transaction. Article 66 of Regulations 77, promulgated on February 10, 1933, provided in part as follows:

> "*Art. 66. Sale by corporation of its capital stock.*—* * * If, for the purpose of enabling a corporation to secure working capital or for any other purpose, the shareholders donate or return to the corporation to be resold by it certain shares of stock of the company previously issued to them, or if the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered a capital transaction and the proceeds of such sale will be treated as capital and will not constitute income of the corporation. A corporation realizes no gain or loss from the purchase or sale of its own stock. (See article 176.)"

This Treasury Regulation was in effect at the time the transactions here in question took place. The Regulation was not a new one, but was based on a long established administrative practice to the same effect, evidenced by the following regulations and rulings, among others:

Regulations 45, Arts. 542 and 563, Rev. Act of 1918
Regulations 62, Arts. 543 and 563, Rev. Act of 1921
Regulations 65, Arts. 543 and 563, Rev. Act of 1924
Regulations 69, Arts. 543 and 563, Rev. Act of 1926
Regulations 74, Arts. 66 and 176, Rev. Act of 1928
Regulations 77, Arts. 66 and 176, Rev. Act of 1932
Law Opinion 296, 5 C.B. 210
Law Opinion 426, 5 C.B. 210
Law Opinion 1035, 2 C.B. 132, 133
Law Opinion 1035, revised, 3 C.B. 160, 162
A. R. R. 693, 5 C.B. 207
A. R. R. 799, C.B. I-1, 374
I. T. 1198, C.B. I-1, 275
I. T. 1736, C.B. II-2, 274
I. T. 1802, C.B. II-2, 267
Solicitor's Memorandum 2205, C.B. III-2, 244

Moreover, this interpretation of the law has been consistently followed by the Board of Tax Appeals and the Courts in the following decisions, among others:

Simmons & Hammond Mfg. Co., 1 B. T. A. 803 (1925).
Cooperative Furniture Co., 2 B. T. A. 165 (1925).
Atlantic Carton Corp., 2 B. T. A. 380 (1925).
Emerson Electric Mfg. Co., 3 B. T. A. 932 (1926).
Illinois Rural Credit Assn., 3 B. T. A. 1178 (1926).
Hutchins Lumber & Storage Co., 4 B. T. A. 705 (1926).
Liberty Agency Co., 5 B. T. A. 778 (1926)
105 West 55th St., Inc., 15 B. T. A. 210 (1929), affirmed 42 F. (2d) 849.

J. H. Johnson, 19 B. T. A. 840 (1930), affirmed 56 F. (2d) 58.
American Cigar Co., 21 B. T. A. 464 (1930), affirmed 66 F. (2d) 425.
Inland Finance Co., 23 B. T. A. 199 (1931), affirmed 63 F. (2d) 886.
Carter Hotel Co., 25 B. T. A. 933 (1932), affirmed 67 F. (2d) 642.
Ohio Central Telephone Co., 28 B. T. A. 96 (1933).

It seems, therefore, that the amended Regulations, promulgated after the transactions in question had taken place, should not be material to the decision in this case. In this connection the Circuit Court of Appeals in the *Reynolds* case said:

> "We do not undertake to say that the present regulation would not have been a correct interpretation of the statute, as applied to such facts as are now before us, if it had been promulgated in 1918. But, as we have seen, the prevailing opinion in that year and thence continuously until 1934 forbad the taxation of such a profit as the Tobacco Company earned in 1929 in the sale of its own stock; and Congress in the light of this interpretation of its intent reenacted in substantially the same words the definition of income subject to tax in five successive carefully considered revenue acts. * * *"

It is therefore believed that this Court should have decided this case on the law as interpreted by the regulations in existence at the time the transactions took place, and in accordance with the long established administrative practice upon which such regulations were based. As the Circuit Court of Appeals for the Fourth Circuit said in the *Reynolds* case:

> "* * * the rule is well settled that if a statute is reasonably susceptible of two constructions, its

> reenactment after an interpretative ruling by responsible officials amounts to a legislative sanction of the course pursued. Especially is this true when the construction has been long maintained and several reenactments of the language in dispute have taken place.* * *"

Point III. Third Party May Not Question Validity of Unenforceable Contract if Parties Thereto Elect to Carry It Out: In deciding this case, the Court held that the agreement among the original subscribers was only a "gentleman's agreement" and did not give rise to a legal obligation on the part of the corporation to take its stock from dissatisfied subscribers.

It is submitted that the Court erred in treating the executed contract as if there were no contract at all. Admittedly, the contract would have been more formal had it been reduced to writing, but the parties were friends (and the Board so found) and regarded their oral promises to be as honorable as written ones.

The promise to buy the stock back, made at the time the stock was sold, was just as important an element of the consideration in the contract as was the payment of the money by the purchasers. The contract was enforceable in law unless the opposing party pleaded the statute of frauds, and since the parties elected to stand by their oral promises, certainly the Government may not complain.

That the Government may not complain of loss of revenue simply because taxpayers elect to deal honestly without regard to the statute of limitations or statute of frauds is shown by the following authorities:

Williston on Contracts, Vol. I, Sec. 530, states the rule as follows:

> "Sec. 530. *Third persons cannot take advantage of the Statute.*

"It follows from what has been stated that a contract or sale within the statute is valid except that it cannot be enforced against either party or his successor in interest unless the statute has been satisfied as to him. A third party should not be able to assert the invalidity of such transactions, unless he is an assignee or successor to a party to the contract. In general the authorities support this view. * * *"

This rule is followed in Secs. 218 and 219 of the Restatement of the Law of Contracts and is also supported by the following decisions:

Francis M. Camp v. *Commissioner of Internal Revenue*, 21 B.T.A. 962, acquiesced in by the Commissioner of Internal Revenue, X-1 C. B. 11.

Alfred T. Wagner v. *Commissioner of Internal Revenue*, 17 B.T.A. 1030, acquiesced in by the Commissioner of Internal Revenue, IX-1 C. B. 56.

Joseph F. Hindes v. *Commissioner of Internal Revenue*, 28 B.T.A. 498, affirmed in 74 F. (2d) 537 (C. C. A. 4th).

CONCLUSION.

For the reasons set forth above, petitioner prays that a rehearing be granted.

Respectfully submitted,

JOHN E. MCCLURE,
920 Southern Building,
Washington, D. C.,
Attorney for Petitioner.

Of Counsel:
MAUDE ELLEN WHITE,
MILLER & CHEVALIER,
Washington, D. C.

I, John E. McClure, of Washington, D. C., attorney herein, do certify that in my opinion the foregoing statements are well founded, and that the petition is not presented for the purpose of creating a delay; I believe that a rehearing is necessary in order that Justice may be done and that the decision of the Court is erroneous in law.

JOHN E. MCCLURE,
Attorney for Petitioner.

[fol. 40] In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1938

No. 6696

First Chrold Corporation, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Sur Petition for Rehearing

And Now, to wit June 28th after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, June 28, 1938.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed June 28, 1938. Wm. P. Rowland, Clerk.

[fol. 41] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of First Chrold Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 6696, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 23d day of September, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundred and sixty-third.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 42] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 7, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 328.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ